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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

June 3, 1994

The Honorable John D. Dingell
Chairman
Subcommittee on Oversight and
Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515-6116

90-314 ✓
92-100

Re: Broadband (2 GHz) PCS Pioneer's Preferences

Dear Chairman Dingell:

This letter responds to your letter dated May 3, 1994, requesting that the Federal Communications Commission ("Commission") investigate allegations related to the grant of certain pioneer's preferences. As explained below, our investigation included an examination of the various proceedings in which the Commission awarded pioneer's preferences, an examination of the ex parte notices that were filed in the various dockets related to the PCS and pioneer's preference proceedings, and inquiries of over 120 current and former Commissioners and Commission staff. The Subcommittee's letter alleges that there were "egregious and repeated" violations of the Commission's ex parte rules in connection with the pioneer's preference awards. Our investigation uncovered no such violations by the Commissioners or the Commission staff. We also determined that the process for awarding pioneer's preferences afforded ample notice and opportunity for public comment, and in fact, ample comment was received from interested parties.

The pioneer's preference recipients are American Personal Communications ("APC"), Cox Enterprises, Inc. ("Cox"), Mobile Telecommunication Technologies Corporation ("Mtel") and Omnipoint Communications, Inc. ("Omnipoint"). APC, Cox and Omnipoint received pioneer's preferences for broadband (2 GHz) PCS, and Mtel received a pioneer's preference for narrowband (900 MHz) PCS. This letter contains our response to each of the questions posed by the Subcommittee related to the broadband PCS pioneer's preference awards. Issues related to the narrowband PCS pioneer's preferences awarded to Mtel are being addressed in a separate letter also being sent today.

The Subcommittee's inquiries involve several interrelated Commission proceedings, which are summarized briefly below as

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background for our responses to the Subcommittee's questions. On April 9, 1991, the Commission adopted rules to establish a pioneer's preference program designed to encourage and reward innovators of new communications services or technologies. See Report and Order in Gen. Docket No. 90-217, 6 FCC Rcd 3488 (1991),¹ recon. granted in part, 7 FCC Rcd 1808 (1992),² further recon. denied, 8 FCC Rcd 1659 (1993)³; 47 C.F.R. §§ 1.402-1.403, § 5.207. In order to qualify for a preference under these rules, a requester must propose allocation of spectrum for a new service or substantial enhancement to an existing service by using innovative technology. To be granted, a request must be supported by a demonstration of its technical feasibility. If the requirements of the rules are met, the requester will be awarded a pioneer's preference. The application filed by the pioneer's preference recipient for a license in the geographic area of its preference is not subject to competing applications. As many requests for preferences as meet the standards set in the rules may be granted, although the Commission has indicated that it would not award preferences where other frequencies would not be available in the market for non-recipients of pioneer's preferences. Memorandum Opinion and Order in Gen. Docket No. 90-217, 8 FCC Rcd at 1659 n.4.

The Commission formally addressed the subject of allocating spectrum for PCS for the first time on June 14, 1990, when it issued a notice of inquiry in response to petitions for rulemakings which specifically requested allocation of spectrum for PCS. See Notice of Inquiry in Gen. Docket 90-314, 5 FCC Rcd 3995 (1990).⁴ On October 25, 1991, the Commission issued a Policy Statement and Order in Gen. Docket 90-314, 6 FCC Rcd 6601

¹ Chairman Sikes and Commissioners Quello, Marshall, Barrett and Duggan voted in favor of the Report and Order. Commissioners Marshall and Duggan also issued separate statements.

² Chairman Sikes and Commissioners Quello, Marshall, Barrett and Duggan voted in favor of the Memorandum Opinion and Order.

³ Commissioners Quello, Barrett and Duggan voted in favor of the Memorandum Opinion and Order. Commissioner Marshall did not participate in this decision.

⁴ This was a decision by the full Commission. Individual votes were not noted.

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(1991),⁵ in which it indicated that it intended to define PCS broadly, to adopt regulations to promote the rapid development of PCS, and to promote competition in PCS and in telecommunications in general.

On July 16, 1992, the Commission proposed the establishment of both narrowband and broadband PCS services and made a tentative award of a pioneer's preference to Mtel for a license for the 900 MHz narrowband service. See Notice of Proposed Rule Making and Tentative Decision in Gen. Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992).⁶ On October 8, 1992, the Commission tentatively concluded that pioneer's preferences should be awarded to APC, Cox, and Omnipoint for their innovative efforts in the development of broadband PCS services. See Tentative Decision and Memorandum Opinion and Order in Gen. Docket No. 90-314, 7 FCC Rcd 7794 (1992),⁷ appeal pending sub nom. Adams Telecom, Inc. v. FCC, No. 93-1103 (D.C. Cir. filed February 2, 1993).

On June 24, 1993, the Commission adopted final rules for the establishment of narrowband PCS and made final its tentative award of a pioneer's preference to Mtel. See First Report and Order in Gen. Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993),⁸ appeal pending sub nom. BellSouth Corp. v. FCC, No. 93-1518 (D.C. Cir. filed August 20, 1993). There are no claims before the Commission of any procedural impropriety regarding the grant of a pioneer's preference to Mtel.

In August, 1993, Congress enacted legislation authorizing the Commission to conduct competitive bidding for resolving

⁵ Chairman Sikes and Commissioners Quello, Barrett, Marshall and Duggan voted in favor of the Policy Statement. Commissioner Barrett issued a separate statement.

⁶ Chairman Sikes and Commissioners Barrett, Duggan and Marshall voted in favor of the NPRM. Commissioner Quello concurred in a separate statement. Commissioners Barrett and Marshall also issued separate statements.

⁷ Chairman Sikes and Commissioners Quello, Barrett and Marshall voted in favor of the Tentative Decision. Commissioner Duggan concurred and Commissioner Barrett issued a separate statement.

⁸ Interim Chairman Quello and Commissioners Barrett and Duggan voted in favor of the First Report and Order. Commissioner Barrett issued a separate statement.

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mutually exclusive applications in certain services. In response, the Commission commenced a rulemaking proceeding on October 21, 1993, to consider "whether our pioneer's preference rules continue to be appropriate in an environment of competitive bidding" and, alternatively, "whether if we retain the preference rules, we should amend them to better work with our competitive bidding authority." See Notice of Proposed Rule Making in ET Docket No. 93-266, 8 FCC Rcd 7692, 7693-94 (1993) (the pioneer's preference review proceeding).⁹

In the NPRM, the Commission indicated that, as a matter of equity because final preference grants already had been made, "nothing in this review will affect" pioneer's preference decisions in narrowband PCS and the non-geostationary (NVNG) mobile satellite service below 1 GHz (so-called "Little LEOs"). Thus, the Commission determined that its authority to conduct auctions would not affect Mtel's pioneer's preference for narrowband PCS. With respect to broadband PCS and other services for which tentative pioneer's preference grants or denials had been made, the Commission requested "comment on whether any repeal or amendment of our rules should apply." Id. at 7694-95.

On December 23, 1993, the Commission decided that, as a matter of equity, the existing preference rules should continue to apply in the proceedings (such as broadband PCS) in which tentative preferences already had been granted or denied.¹⁰ Thus, recipients of preferences for these services would not have to pay for any license they may receive as a result of a preference. See First Report and Order in ET Docket No. 93-266, 9 FCC Rcd 605 (1994).¹¹ However, the Commission concluded that action on the basic underlying question in that proceeding -- whether to repeal, retain, or amend the pioneer's preference rules -- should be deferred to a later Report and Order.

On December 23, 1993, the Commission took final action on the broadband PCS pioneer's preference requests by affirming its

⁹ Interim Chairman Quello and Commissioner Duggan voted in favor of the NPRM. Commissioner Barrett disapproved in part and concurred in part in a separate statement.

¹⁰ Commissioners Quello, Barrett and Duggan voted in favor of the First Report and Order. Chairman Hundt did not participate in the decision.

¹¹ The Commission reiterated the decision it made in the Notice, namely that any changes in the pioneer's preference rules would not apply to narrowband PCS.

tentative awards of pioneer's preferences for PCS broadband licenses to APC, Cox and Omnipoint. See Third Report and Order in Docket 90-314, 9 FCC Rcd 1337 (1994)¹², petitions for recon. pending, appeals pending sub nom. Pacific Bell v. FCC, No. 94-1148 (D.C. Cir., filed March 1, 1994). Chairman Hundt recused himself from both of these decisions because his former law firm represented one of the parties to the broadband pioneer's preference proceedings.

On February 3, 1994, in response to petitions for reconsideration challenging various aspects of Mtel's narrowband pioneer's preference, the Commission reaffirmed its grant of a nationwide 50 KHz pioneer's preference to Mtel. In so doing, it reaffirmed that Mtel would not be required to make any payment (other than the standard filing fees) for its license. See Memorandum Opinion and Order in Gen. Docket No. 90-314 and ET Docket No. 92-100, 9 FCC Rcd 1309 (1994).¹³

Different ex parte rules apply to various aspects of the pioneer's preference, PCS and related proceedings. For example, the pioneer's preference review (ET Docket No. 93-266) and PCS spectrum allocation (Gen. Docket No. 90-314, ET Docket No. 92-100) rulemaking proceedings are non-restricted proceedings in which ex parte communications are permissible but must be disclosed. See 47 C.F.R. § 1.1206. Although the pioneer's preference requests were considered in the context of the PCS spectrum allocation rulemaking proceedings, they are treated separately within the rulemaking dockets as adjudicative-type proceedings rather than rulemakings. Each pioneer's preference proceeding is assigned a "PP" docket number within the rulemaking docket. These adjudicatory proceedings to determine who may receive a PCS pioneer's preference are restricted once they are formally opposed, at which time ex parte presentations are prohibited. See 47 C.F.R. § 1.1208.

Under the Commission's rules, however, status inquiries as well as communications that are "inadvertently or casually made" are not considered ex parte presentations. 47 C.F.R. § 1.1202(a). In addition, the pendency of a restricted adjudicatory proceeding does not preclude parties from making permissible ex parte

¹² Commissioners Quello, Barrett and Duggan voted in favor of the Third Report and Order. Each issued a separate statement. Chairman Hundt did not participate in the decision.

¹³ Chairman Hundt and Commissioners Quello and Barrett voted in favor of the Memorandum Opinion and Order. Commissioner Barrett issued a separate statement.

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presentations in related rulemaking proceedings, so long as no presentations are made regarding the restricted adjudications. See Report and Order in Gen. Docket No. 86-225, 2 FCC Rcd 3011, 3014 (1987). For example, a pioneer's preference recipient could make an ex parte presentation generally about rules that may ultimately affect its preference request so long as it does not specifically address the merits of its particular preference request. See Report and Order in Gen. Docket No. 90-217, 6 FCC Rcd at 3493, 3500 n.9.

Following are the responses to the questions posed by the Subcommittee with respect to broadband PCS pioneer's preference issues. All responses apply to events which occurred through May 13, 1994, unless otherwise indicated in our response or by the context of the question.

In responding to this and other questions in your letter, we have reviewed the ex parte notices filed in the relevant rulemaking dockets and information provided by current and former Commissioners and Commission staff involved in the relevant proceedings. These individuals reviewed their calendars, notes, phone logs and recollections of events during this period. Information provided by these individuals was used to cross-check items filed with the Commission and vice versa. It is important to note, however, that some individuals could not recall the details of some contacts. In addition, the Office of General Counsel has not contacted any individuals outside the Commission other than former Commissioners and their staffs who were at the Commission during or after January, 1992.¹⁴ Consistent with discussions with your staff, we have not included pleadings and other formal filings within the scope of our investigation.

1. Was the Commission's decision in the matter styled "ET Docket No. 93-266" made at an open meeting? Or was this decision made using the Commission's "circulation" procedures?

The First Report and Order in ET Docket No. 93-266 (the pioneer's preference review proceeding) was adopted by circulation, using the Commission's electronic voting procedures, on December 23, 1993. The circulation process is described in more detail in response to Question 2(a), below.

2. It is my understanding that the Commission's practice is to

¹⁴ The introductory pages to Exhibit 4 identify the Commissioners and Commission staff who had contacts with the broadband PCS pioneer's preference recipients.

release immediately the text of Commission decisions made using the Commission's "circulation" procedures. It is also my understanding that the "circulation" practice involves a series of sequential edits to tentative decisions by the participating Commissioners, and accompanying "pink sheets" to colleagues explaining the reasons for changes.

- a. When was the text of the Commission's decision in the above-referenced Docket released?

The text of the First Report and Order was released on January 28, 1994.

- b. Please describe the "circulation" process to the Subcommittee in detail.

The Commission takes action either at formal Commission meetings or by circulation. The circulation process involves "the submission of a document to each of the Commissioners for approval." 47 C.F.R. § 0.5(d). The majority of the Commission's decisions are adopted on circulation.

The circulation process is conducted through either of two methods. Most commonly, a draft decision document prepared by the Commission staff is formally distributed to the Commissioners for review, and voting is accomplished through the Commission's electronic voting system. Then, each Commissioner registers his or her vote by computer. Occasionally, when time is of the essence, a manual process is used. With the manual process, a draft decision document prepared by the relevant staff is brought to the Commissioners, either at the same time or sequentially. Each Commissioner is then asked to register his or her vote by initialing a "Request for Special Action by Circulation" form (the so-called "pink sheet").

Under both methods, the circulation process involves an informal editing process. As Commissioners review and vote an item and before the item is finalized for release, the Commissioners (and their staffs, as well as other Commission staff) may propose edits to the item. To the extent these edits are substantive, they are reviewed and approved by all of the Commissioners voting for the item before the item is finalized for release.

- c. In formulating your answer to question 2(a) above, did you have access to the "pink sheets"? Were you able to determine whether significant changes were made after the announcement of the decision on December 23 and prior to the release of the text of the Commission's

decision?

As noted in response to Question 2(b), most of the Commission's decisions which are made on circulation are made by computerized voting rather than via pink sheets. The decision to adopt the First Report and Order in ET Docket No. 93-266 was made by computer. The editorial changes made to the item between the December 23, 1993 adoption date and the January 28, 1994 release date did not alter the decisions. Only two arguably significant edits were made. The first was the inclusion of additional language in the background section of the item to summarize additional comments received from the public. The second was the inclusion of language in the discussion section stating more explicitly that the decision not to change the pioneer's preference rules for broadband PCS and similarly situated services meant that no payment would be required for licenses granted to pioneer's preference recipients in those services. All edits were reviewed and approved by the Commissioners before the item was released.

- d. Are you aware of any cases involving other Commission decisions that were made "on circulation" in which the text of the decision was not released for more than 30 days?

Yes. For example, between January 1, 1993 and May 6, 1994, we have identified thirty-five (35) Commission decisions made on circulation that were released more than thirty days after the decision was adopted.

3. Are you able to account for the delay in the release of this text?

Yes. The decision in Docket No. 93-266 was made on Thursday, December 23, 1993. Because of the holiday season and related vacations, weather-related closings in January and the press of other Commission business, the editing and release process took longer than usual. During this period, there were five days which were holidays or days on which the Commission was closed because of inclement weather, and six liberal leave days.

4. During the period between the announcement of a decision and the release of the text of that decision, it is my understanding that the subject proceeding is restricted under the Commission's rules. Are you aware of any contacts by entities designated as "pioneers" during the period beginning when the Commission's decision was announced and ending when the text of that decision was released? In your response, please include any contacts in the above-

referenced proceeding and any other proceedings, including filings made with respect to experimental licenses.

In cases where the Commission votes on an item at an open meeting, the so-called "sunshine period" prohibition in the Commission's ex parte rules prohibits most communications to the Commission about the merits of an item before its release. In contrast, when items are voted on circulation, such as the First Report and Order in ET Docket No. 93-266, the sunshine period prohibition is not triggered. Rather, circulation items are governed by the normal ex parte rules which, in the case of rulemakings such as ET Docket No. 93-266, permit ex parte presentations so long as they are disclosed. We have not identified any contacts by pioneer's preference recipients regarding ET Docket No. 93-266 during the period between the adoption of the First Report and Order on December 23, 1993 and the release of the order on January 28, 1994. The only contacts we have identified which occurred during this time in any other relevant proceedings were made by APC and Omnipoint in January, 1994 in Gen. Docket No. 90-314 (the broadband PCS proceeding). A list of these contacts are attached as Exhibit 1. Summaries of each of these contacts were filed with the Commission as required by the Commission's ex parte rules.

5. **Please obtain copies of [correspondence cited in Question 5] and other relevant correspondence and submit to the Subcommittee your analysis of the allegations contained therein. Please supply any documents necessary to support your conclusions.**

Attached as Exhibit 2 is a letter from the Commission's Managing Director, prepared in consultation with the General Counsel, concluding after extensive review that no ex parte violations occurred in connection with the allegations raised in this correspondence about the grant of pioneer's preferences to APC, Cox and Omnipoint.¹⁵ These are the only allegations made to the Commission of improper ex parte contacts with respect to the grant of pioneer's preferences to APC, Cox and Omnipoint in the broadband PCS proceeding.¹⁶

¹⁵ However, the Managing Director did note certain technical deficiencies in notices of permissible ex parte presentations made by these parties in the pioneer's preference review rulemaking.

¹⁶ In addition, there has been an allegation by Qualcomm, Inc., an unsuccessful broadband PCS pioneer's preference requester, that in an experimental report Omnipoint made an

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Exhibit 2 also contains copies of all the correspondence requested in Question 5 of your letter. In addition, the following letters are included:

Letter from Jonathan D. Blake to Andrew S. Fishel (May 12, 1994)

Letter from Michael K. Kellogg to Andrew S. Fishel and William E. Kennard (May 17, 1994)

6. On what date, or dates, did the Commission's "Pioneer Preference" process become a restricted proceeding? Did the Commission issue any announcement or otherwise inform the public as to the date or the nature of the restrictions that would pertain? If so, please provide copies of any such announcements to the Subcommittee.

As noted previously, each pioneer's preference request is treated as an individual adjudication within a larger Commission rulemaking docket concerning the proposed new service at issue. In the case of broadband PCS services, the applicable docket was Gen. Docket No. 90-314. When a request for a preference is filed with the Commission, that request is assigned a "PP" number within the existing docket. Each application for a pioneer's preference becomes restricted under the ex parte rules on the date a filing is made formally opposing the request.

The preference requests for each of the three broadband pioneer's preference recipients were formally opposed. The APC request became restricted on January 24, 1992, and the Cox and Omnipoint requests on June 10, 1992.

Before and after the dates on which these proceedings became restricted, the Commission issued announcements informing the public of the restricted nature of the pioneer's preference proceedings, either generally or with respect to broadband PCS. First, on May 13, 1991, the Commission released a Report and Order in Gen. Docket No. 90-217 adopting the pioneer's preference rules. 6 FCC Rcd 3488 (1991). In that Report and Order, the Commission explained that any request for a pioneer's preference would become restricted upon the filing of a formal opposition. 6 FCC Rcd 3493.

impermissible ex parte presentation in connection with Qualcomm's request. That matter will be addressed by the Commission in connection with Qualcomm's pending petition for reconsideration of the denial of its preference request.

On June 15, 1992, five days after the Cox and Omnipoint preference requests became restricted, the Commission staff issued a public notice explaining that the ex parte restrictions applied to pioneer's preference requests at the time at which the requests were formally opposed. Public Notice, Ex Parte Presentations relating to requests for Pioneer's Preferences, 7 FCC Rcd 4046 (Chief Engineer 1992).

On November 6, 1992, the Commission issued its Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992) in the broadband PCS proceeding (Gen. Docket No. 90-314). Therein, the Commission indicated that the broadband PCS pioneer's preference proceedings were restricted and that ex parte presentations were prohibited until the proceeding is no longer subject to administrative or judicial review. Id. at 7813, ¶ 50.

On February 12, 1993, the Commission staff issued another public notice reminding parties that the broadband PCS pioneer's preference proceedings are restricted. Public Notice, Ex Parte Presentations Relating to 2 GHz Personal Communications Services' Pioneer's Preference Requests, 8 FCC Rcd 1511 (Chief Engineer/Managing Director 1993).

Copies of the foregoing documents are attached as Exhibit 3.

7. Did the staff that was preparing recommendations to the Commissioners with respect to "Pioneer Preference" designations have substantive contact of any sort with applicants after the date on which the preference proceeding was considered restricted? For example, were any of the staff who participated in making recommendations to the Commission on pioneer preference entitlements also reviewing reports concerning experimental licenses filed by the applicants after the date the proceeding was considered restricted?

Yes, the staff that was preparing recommendations to the Commission had substantive contact with the successful broadband PCS pioneer's preference recipients after the date on which the specific pioneer's preference adjudications became restricted. See Exhibit 5, provided in response to Question 8. As noted above, contacts with respect to the various rulemaking proceedings were not prohibited under the ex parte rules. Similarly, status inquiries and casual remarks were not prohibited under the ex parte rules.

Several of the Commission staff members worked on both the various PCS and pioneer's preference-related proceedings. This

is consistent with general Commission practice to assign staff to multiple projects involving similar issues or requiring similar expertise. With respect to your specific example, some of the staff who made recommendations to the Commission concerning preference requests also reviewed experimental license applications and reports.

8. Please identify the dates, participants in, and specific subjects of all meetings, conversations or communications of any sort between Commission staff or Commissioners and any of the four applicants ultimately designated as "pioneers" after the dates on which the Commission considers the proceedings to have been restricted. Please include any contacts which addressed personal communications services in general; experimental licenses held by applicants (including technical trials or reports of any sort related thereto); or any contacts related to the "pioneer preference" rules as considered in Docket 93-266 or more generally. In your response, please include a listing of all contacts, including those considered to be status inquiries.

Please provide a copy of all written materials submitted to the Commissioners or staff with respect to the above issues.

A list of all such contacts that we have identified with respect to the broadband PCS pioneer's preference recipients is attached as Exhibit 4. As noted above, contacts with respect to the various rulemaking proceedings are not prohibited under the ex parte rules if disclosed. Similarly, status inquiries and casual remarks are not prohibited under the ex parte rules. The copies that we have been able to identify of written materials submitted to the Commissioners or staff in connection with these contacts are attached as Exhibit 5. Copies of the relevant ex parte notices are attached as Exhibit 6.

9. a. Do any of the technical or other reports on the experimental licenses of the four applicants who received a "pioneer preference" award, filed on or after the dates on which the Commission considers the PCS "Pioneer Preference" proceeding to have become restricted, address or respond to arguments made by commenters concerning any of the recipient's qualifications to receive a pioneer preference?

Based on our review of the experimental license reports filed by the successful broadband pioneer's preference requesters, we identified one such report. On August 19, 1993, Omnipoint filed an experimental report that contained responses to comments made by Qualcomm.

- b. If your answer to the above [Question 9(a)] is "no", please address your understanding of the meaning of Mtel's statement in its progress report, filed June 29, 1992, that "Mtel decided to revise its planned test schedules and first evaluate its Multi-Carrier Modulation ("MCM") techniques in order to conclusively address comments made by other parties in response to Mtel's June 1, 1992, MCM Technical Feasibility Demonstration," and its submission therein of materials bolstering its claim that it could achieve the data rates for which it ultimately was awarded a preference.

The answer to Question 9(a) is "No" with respect to broadband PCS. Mtel's statement is addressed in a separate letter regarding narrowband PCS.

- c. Were any of the reports filed in the Experimental License files by the four "Pioneer Preference" recipients served by those recipients on parties opposing their "Pioneer Preference" awards? Did the Commission's rules require service of these reports on the entities opposing the "Pioneer Preference" awards made by the Commission?

Some (but not all) of the experimental license reports by the broadband PCS pioneer's preference recipients were served. The Commission's rules do not explicitly provide for service of the experimental reports. As explained below in response to Question 9(d), the reports were available to the public.

- d. Were any procedures established by the Commission to notify opponents to the awards that the reports had been received, or that the recipients had met with Commissioners or Commission staff regarding the experimental licenses, or reports associated therewith? If not, would such notice and opportunity to comment have been proper?

Yes. On May 10, 1991, the Chief of the Frequency Allocations Branch of the Office of Engineering and Technology filed a memorandum in Gen. Docket No. 90-314, indicating that PCS experimental license reports were being incorporated into the docket, and that such reports were available for public inspection and copying. Based on the recollections of the Commission staff persons involved in the experimental licensing process, numerous parties inspected and copied the documents. No procedures were established to notify the public of any meetings by pioneer's preference requesters regarding their experimental

reports. Because numerous parties inspected and copied the reports, it does not appear that additional notice and comment procedures were necessary.

- e. Has the Commission determined that no ex parte information received by the Commissioners or Commission staff on or after the dates on which the proceedings became restricted was considered by the staff in its recommendations that the "Pioneer Preference" recipients were so entitled? If so, what is the basis for such a determination?

As noted above, ex parte presentations in the rulemaking proceedings were not prohibited so long as they did not address the merits of the pioneer's preference requests. In addition, status requests and casual or incidental remarks were not prohibited. We have not identified any contacts that fall outside these categories of permissible communications. In this regard, the Commission's rules require that impermissible ex parte presentations in restricted proceedings be reported to the Managing Director, 47 C.F.R. § 1.1212, and no such reports have been made regarding broadband PCS pioneer's preferences other than the letters discussed in Question 5 above. As noted in response to Question 5, the Managing Director determined that no ex parte violations occurred in connection with the allegations raised in this correspondence about the grant of pioneer's preferences to APC, Cox and Omnipoint, except technical deficiencies in the notices of permissible ex parte presentations filed with the Commission.

- f. Has the Commission determined that no ex parte information received by the Commissioners themselves, either directly or through the staff, on or after the date the proceedings became restricted, was considered in determining whether the recipients were entitled to "Pioneer Preferences"? If so, what is the basis for such a determination?

Based on our interviews with the Commissioners and their staffs, we have determined that after the broadband PCS pioneer's preference proceedings became restricted, none of the Commissioners received ex parte presentations which addressed the merits of the APC, Cox or Omnipoint pioneer's preference requests or were otherwise outside the categories of permissible communications. In addition, before receiving ex parte presentations by pioneer's preference recipients, the Commissioners or their staffs routinely reminded the recipients that discussion of the merits of contested pioneer's preference requests is prohibited. Similarly, before receiving ex parte

presentations related to the PCS rulemaking issues from pioneer's preference recipients, Chairman Hundt and/or his staff advised them that he is recused from all proceedings related to the award of pioneer's preferences in the broadband PCS services and that discussions should be confined to permissible topics.

10. With respect to the four entities ultimately designated as recipients of "Pioneer Preference" awards, please respond to the following questions:

- a. On what dates did Commission personnel visit the sites at which experiments were conducted to verify the results of the trials?

Commission staff did not visit any test sites to verify broadband PCS trial results. A staff person from the Commission's Office of Engineering and Technology (OET) visited APC's test site to view a demonstration of APC's CT-2 (second generation cordless telephone) technology in the 900 MHz band, but not for the purpose of verifying test results. APC was not awarded a preference for this technology; its preference was granted in the 2 GHz band. We are unable to determine the exact date of the visit.

- b. Please furnish the Subcommittee with the names and titles of all such personnel.

Thomas Mooring, an Electronics Engineer in OET, made the visit described above.

- c. Please describe the reports that were drafted subsequent to site visits.

Not applicable.

- d. How were such reports treated by the Commission? Were they placed in the Public File? Were they released to the public so as to permit comments? Please detail any comments that were received by the Commission in response to their release to the public.

Not applicable.

- e. Did the Commission establish an internal review process for such reports? Please list the names and titles of all Commission personnel involved in such a review.

Not applicable.

- f. Did the Commission establish a "Peer Review" process for the independent review of testing results? If so, please furnish the Subcommittee with a description of such a process, including the names and credentials of any "Peer Review" panel that examined and verified test results.

No.

11. With respect to the site visits referred to above, please furnish the Subcommittee with the following information:

- a. During the conduct of the testing, how many channels were utilized for each applicant during each test?

Not applicable.

- b. What channel assignments were utilized for each test? Were these the same channel assignments, or at least in the same frequency band, as the assignments that had been granted for the four recipients of the "Pioneer Preference" designation? If not, how does the Commission intend to enforce its condition that "each licensee must build a system that substantially uses the design and technologies upon which its preference award is based"?

No such testing occurred. As in all cases in which it imposes conditions on licenses, the Commission will have available the full range of sanctions provided in the Communications Act to discipline a broadband pioneer's preference recipient if it violates a condition of its license. For example, the Commission could fine the licensee, issue a cease and desist order, revoke its license or decline to renew its license. The Commission has not indicated specifically which of these enforcement mechanisms would be invoked in the event that Cox, APC or Omnipoint were to violate a license condition.

- c. During the conduct of the testing, how many base stations were built for each of the four applicants? How far apart were the base stations? During the course of the site visits, how many handsets were the Commission personnel able to verify were deployed? How many hand-offs were recorded by Commission personnel?

Not applicable.

12. a. During the course of the Committee's deliberations concerning the auctioning provisions of last year's

"Omnibus Budget Reconciliation Act," there were varying estimates of the amount of revenue that would be received by the Government as the result of assigning frequencies by competitive bidding. It is my understanding that the most recent estimate by the Office of Management and Budget is \$30 per "pop" (unit of population). Using this estimate, please furnish the Subcommittee with an analysis of revenue foregone directly for the four licenses that will not be issued by competitive bidding procedures if the Commission issues licenses to the four recipients of "Pioneer Preference" awards.

We have not independently estimated the auction revenue foregone from the three broadband PCS pioneer's preference awards. Developing an accurate estimate of foregone revenue is difficult. There are no established numerical values for the nationwide market for narrowband PCS, for the spectrum being used for PCS or for the PCS technology itself, which is new.

We are not aware of any OMB estimates of \$30 per unit of population, or "pop." However, the House Budget Committee estimated in 1993 that total broadband PCS revenues would be approximately \$10 billion. Dividing \$10 billion by the U.S. population of approximately 250 million results in an average estimated value of \$40 per pop for all 120 MHz of spectrum allocated to broadband PCS. Thus, the 30 MHz of PCS spectrum awarded to each of the broadband PCS pioneer's preference recipients would represent approximately \$10 per pop. At \$10 per pop, with the combined population for the three broadband PCS markets of 53.3 million, the auction revenue foregone for the three 30 MHz broadband licenses would be \$533 million.

- b. In addition, please furnish the Subcommittee with your analysis of the effect that issuing these four licenses at no cost to the licensee is likely to have on those who might be prospective bidders for one of the remaining licenses. Please make every attempt to quantify the impact of issuing these licenses without a cost on the bidding strategies of potential bidders.**

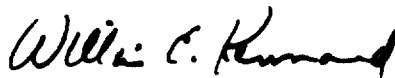
The net effect of awarding licenses under the pioneer's preference rules on the value of the remaining PCS licenses cannot be quantified easily. It could result in an increase or a decrease in auction revenues derived from the remaining licenses, depending on the circumstances. The Commission's staff believes that issuing these licenses prior to auctioning the remaining licenses could affect the strategies of potential bidders and the

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ultimate assignment of licenses. The effect on bidding for the remaining licenses is likely to depend on whether those licenses are complements or substitutes for the licenses awarded under the pioneer's preference rules. Once the pioneer's preference licenses have been issued, bidders (other than the pioneer awarded a license) interested in licenses that are close substitutes for pioneer's preference licenses (e.g., licenses in the same geographic area but on different channels within the same band) would likely be willing to pay more for these remaining licenses. This is because there is one less close substitute available for auctioning. On the other hand, bidders (other than the pioneer awarded a license) interested in complementary licenses (e.g., licenses on the same frequency channel in adjacent geographic areas) would likely be willing to pay less for such remaining licenses than if all the complementary licenses were up for auction at the same time.

As noted above, our review of the PCS and pioneer's preference proceedings, the relevant ex parte notices, and information provided by current and former Commissioners and Commission staff uncovered no misconduct by the Commission in these proceedings. I trust that the foregoing is fully responsive to your inquiries and addresses your concern about possible improprieties by the Commission related to the grant of pioneer's preferences to APC, Cox and Omnipoint. Should you require any additional information in this regard, please contact me.

Sincerely,



William E. Kennard
General Counsel

cc (w/o attachments): The Honorable Dan Schaefer, Ranking
 Republican Member
 Subcommittee on Oversight and
 Investigations

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Attachments:

- Exhibit 1: Contacts by Broadband PCS Pioneer's Preference
 Recipients between December 23, 1993 and January
 29, 1994 (Question 4)
- Exhibit 2: Letter from Andrew S. Fishel to Michael K. Kellogg
 (May 26, 1994) (Question 5)
- Exhibit 3: Notices Regarding Ex Parte Restrictions (Question
 6)
- Exhibit 4: Substantive Contact Between Commission Staff and
 Broadband PCS Preference Recipients After
 Proceedings Became Restricted (Question 8)
- Exhibit 5: Materials Submitted by APC, Cox and Omnipoint
 During Meetings with Commission Personnel
 (Question 8)
- Exhibit 6: Ex Parte Notices

EXHIBIT 1

**Contacts by Broadband PCS Pioneer's Preference Recipients between
December 23, 1993 and January 29, 1994**

(Question 4)

| <u>Notice Date</u> | <u>Meeting Date</u> | <u>Pioneer</u> | <u>Commission Staff Present</u> | <u>Subject of Meeting</u> |
|------------------------|-------------------------|----------------|-------------------------------------|-------------------------------------|
| 1-14-94 | Not specified | APC | Chairman Hundt, Karen Brinkmann | PCS competitiveness |
| 1-19-94 | 1-18-94 | APC | William Kennard, Peter Tenhula | Written submissions ¹ |
| 1-19-94 | 1-18-94 | APC | Chairman Hundt, Karen Brinkmann | Written submissions |
| 1-24-94 | 1-24-94 | Omni- point | David Means, Rick Engelman | Unlicensed PCS |

¹ The term "written submissions" indicates that materials previously filed with the Commission were the subject of the meeting.

EXHIBIT 4

**Substantive Contacts Between Commission Staff and Broadband PCS
Pioneer's Preference Recipients After Proceedings Became
Restricted**

(Question 8)

REPORTED CONTACTS WITH COMMISSION PERSONNEL

The following chart lists contacts with Commissioners and Commission staff members reported by American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint Corporation (Omni) after each party's pioneer's preference request became a restricted proceeding within Gen. Docket No. 90-314. For ease of reference, the dates on which the pioneer's preference requests became restricted are:

APC: January 24, 1992
Cox: June 10, 1992
Omnipoint: June 10, 1992

The list is derived from the Commission's docket files in the following proceedings: ET Docket No. 93-266 (Review of the Pioneer's Preference Rules); PP Docket No. 93-253 (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding); ET Docket No. 92-9 (Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies); Gen Docket No. 90-314 and ET Docket No. 92-100 (Amendment of the Commission's Rules to Establish New Personal Communications services; and Gen. Docket No. 90-217 (Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services).

The following Commission personnel participated in contacts:

Kathleen Q. Abernathy -- Assistant to Commissioner Marshall
Rudolfo Baca -- Assistant to Chairman
Beverly G. Baker -- Deputy Chief, Private Radio Bureau (PRB)
Commissioner Andrew C. Barrett
Lauren J. Belvin -- Assistant to Commissioner Quello; Acting Director, Office of Legislative Affairs (OLA)
Robert E. Branson -- Assistant to Commissioner Barrett
Karen Brinkmann -- Special Assistant to Chairman Hundt
Donald Campbell -- Office of Engineering and Technology (OET)
Kelly Cameron -- Legal Assistant to Bureau Chief, Common Carrier Bureau (CCB)
John Cimko, Jr. -- Chief, Mobile Services Division, CCB
Jackie Chorney -- Office of General Counsel (OGC)
Jonathan V. Cohen -- Special Assistant to Interim Chairman Quello; Office of Plans and Policy (OPP)
Randall S. Coleman -- Assistant to Commissioner Duggan

James R. Coltharp -- Special Advisor to Commissioner Barrett
 Robert Corn-Revere -- Assistant to Commissioner and Interim Chairman Quello
 Diane J. Cornell -- Acting Senior Legal Advisor to Chairman Hundt; Assistant to
 Commissioner Marshall
 Thomas P. Derenge -- OET
 Kathryn Dole -- OGC
 Commissioner Ervin S. Duggan
 Thomas Egler -- Intern to Chairman Hundt
 Richard Engelman -- Chief, Technical Standards Branch, OET
 Michele C. Farquhar -- Assistant to Commissioner Duggan
 Brian F. Fontes -- Chief of Staff to Interim Chairman Quello; Senior Legal Advisor to
 Commissioner Quello
 Bruce A. Franca -- Deputy Chief Engineer
 Donald H. Gips -- Deputy Chief, OPP
 Terry L. Haines -- Chief of Staff to Chairman Sikes
 Ralph A. Haller -- Chief, PRB
 William G. Harris -- Assistant to Commissioner Quello
 Jeffrey H. Hoagg -- Assistant to Commissioner Barrett
 Cecily C. Holiday -- Chief, Satellite Radio Branch, CCB
 John C. Hollar -- Assistant to Commissioner Duggan
 Chairman Reed E. Hundt
 Phillip Inglis -- OET
 Barnett C. Jackson, Jr. --- CCB
 Edward R. Jacobs -- Deputy Chief, Land Mobile and Microwave Division, PRB
 Stevenson S. Kaminer -- Assistant to Commissioner Marshall, Legal Counsel, OET
 Michael Katz -- Chief Economist, OPP
 William E. Kennard -- General Counsel
 Julius Knapp -- Chief, Authorization and Evaluation Division, OET
 David Krech -- CCB
 Evan R. Kwerel -- OPP
 Kathleen Levitz -- Deputy Chief, CCB
 Renée Licht -- Acting General Counsel
 Martin D. Liebman -- Deputy Chief, Rules Branch, Land Mobile and Microwave Division, PRB
 Byron F. Marchant -- Senior Legal Advisor to Commissioner Barrett
 Stephen Markendorff -- Chief, Cellular Radio Branch, Mobile Services Division, CCB
 Paul Marrangoni -- OET
 Commissioner Sherrie Marshall

Rowland K. Martin -- OMD
Geraldine Matise -- Chief, Legal Branch, Mobile Services Division, CCB
Maura McGowan -- OET
David Means -- Chief, Engineering Evaluation Branch, OET
A. Richard Metzger -- Acting Chief, CCB
Matthew Miller -- Assistant to Chairman Sikes
Tom Mooring -- OET
Kent Y. Nakamura -- Legal Counsel, PRB
F. Ronald Netro -- Engineering Assistant, PRB
Linda L. Oliver -- Assistant to Commissioner Duggan
Myron C. Peck -- Deputy Chief, Mobile Services Division, CCB
Robert M. Pepper -- Chief, OPP
Robert L. Pettit -- General Counsel
Nam P. Pham -- OET
Commissioner and Interim Chairman James H. Quello
Karen Rackley -- PRB
Charla Rath -- Assistant to Chairman Sikes
David P. Reed -- OPP
John A. Reed -- OET
Kenneth Robinson -- Assistant to Chairman Sikes
Peter Ross -- Assistant to Commissioner Marshall
Greg Rosston -- OPP
Sara Seidman -- Special Assistant, OGC
Anthony Serafini -- OET
David R. Siddall -- Chief, Frequency Allocations Branch, OET
Chairman Alfred C. Sikes
Rodney Small -- OET
Lisa B. Smith -- Legal Advisor to Commissioner Barrett
Linda Townsend Solheim -- Director, OLA
David H. Solomon -- Assistant General Counsel
Thomas P. Stanley -- Chief Engineer
James M. Talens -- CCB
Peter A. Tenhula -- OGC
Fred Thomas -- OET
Cheryl Tritt -- Assistant to Chairman Sikes; Chief, CCB
Gerald P. Vaughan -- Deputy Chief, CCB
Richard K. Welch -- OGC

ET Docket No. 93-266 (Pioneer's Preference Review)¹

| <u>Letter</u> | <u>Meeting</u> | <u>Party</u> | <u>Participants²</u> | <u>Subject</u> |
|-----------------------|----------------|--------------|---|--|
| 5-9-94 | none | APC | Commission | Cablevision Systems Corporation letter |
| 5-5-94 | 5-5-94 | Omni | Quello, Baca | previous filings |
| 5-3-94 | 5-3-94 | Cox | Baca | comments |
| 4-29-94 | none | Cox | Quello, Barrett, Markendorff, Matise | Cablevision Systems letter |
| 3-31-94 | none | APC | Commission | Bell Atlantic letter opposition |
| 12-20-93 &12-22-90 | 12-17-93 | APC | Fontes, Cohen, Marchant, Hollar, Siddall | APC's written submissions in referenced dockets ³ |
| 12-17-93 | 12-16-93 | APC | Fontes, Cohen, Marchant Hollar | written submissions |
| 12-16-93 | 12-15-93 | APC | Quello, Fontes, Cohen, Hollar, Stanley, Small | written submissions |

¹ This was not a restricted proceeding under the Commission's ex parte rules.

² Where no meeting is indicated, the "participants" are the recipients of the written presentation indicated under "letter."

³ The terms "written submissions" or "comments" are used throughout this Exhibit 4 to indicate that materials previously filed with the Commission were the subject of the meeting.